

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

THOMAS FERNANDEZ, LORA SMITH, and
TOSHA THOMAS, individually and on
behalf of a class of all other
persons similarly situated,

Plaintiffs,

v.

K-M INDUSTRIES HOLDING CO., INC., et
al.,

Defendants.

No. C 06-7339 CW

ORDER DENYING
NORTH STAR'S
MOTION FOR SUMMARY
JUDGMENT

Defendant North Star Trust Company moves for summary judgment on the basis that Plaintiffs' claim against it under the Employee Retirement Income Security Act (ERISA) for breach of fiduciary duty is invalid and is barred by the applicable statute of limitations. Plaintiffs oppose North Star's motion. The matter was heard on October 30, 2008. Having considered oral argument and all of the papers submitted by the parties, the Court denies North Star's motion.

BACKGROUND

Plaintiffs are former employees of either Kelly-Moore Paint Company or Capital Insurance Group (CIG). Kelly-Moore was founded in 1946 by William Moore, who served as the company's president until 1984 and effectively exercised control over the company until shortly before his death in 2004. Kelly-Moore acquired CIG in 1985. Kelly-Moore and CIG continued to be wholly owned by Mr. Moore and his family through a trust (the Moore Trust), the successor trusts of which are Defendants in this lawsuit, until 1998. As discussed below, in 1998, Kelly-Moore and CIG became wholly owned subsidiaries of Defendant K-M Industries Holding Co., Inc. (KMH).

This lawsuit arises from Mr. Moore's establishment of an employee stock ownership plan (ESOP) for Kelly-Moore and CIG employees in 1998. The gist of the complaint is that the ESOP purchased KMH shares for more than they were worth because plan fiduciaries failed to provide valuation experts with complete and accurate information about Kelly-Moore's exposure to liability from asbestos litigation.

I. Kelly-Moore's Asbestos Liability

Kelly-Moore's asbestos problems stem from its 1967 acquisition of Paco Textures Corporation, a company that manufactured joint compound and wall and ceiling texture products, some of which contained asbestos. Kelly-Moore anticipated potential liability arising from Paco's asbestos-containing products as early as 1971, when it created a central repository for asbestos-related documents. Wasow Dec. Ex. 16 at 43-44. In 1976, an internal memo discussed regulations relating to asbestos and advised that the

1 company "could be judged liable in a suit where a person exposed to
2 our asbestos containing product that [sic] developed cancer related
3 injury or death." Id. Ex. 18. Kelly-Moore was first sued for
4 asbestos-related liability in 1977. Id. Ex. 19 at 40.

5 In 1981, Reed International, a British company, considered
6 purchasing Kelly-Moore. As part of its due diligence, Reed sought
7 detailed information concerning the company's involvement with
8 products containing asbestos, and engaged actuaries to determine
9 the company's likely exposure to liability from future asbestos
10 lawsuits. The actuarial report predicted losses that would
11 increase steadily until a peak in 2007. Id. Exs. 22, 23. In a
12 memo addressed to Mr. Moore, Doug Merrill, who is now a Kelly-Moore
13 executive, analyzed the report, disputing some of its assumptions.
14 Id. Ex. 24. Ultimately, Reed did not purchase Kelly-Moore, but it
15 is not clear that the breakdown of the deal was related to the
16 latter's exposure to asbestos liability.

17 Kelly-Moore continued to be concerned about potential losses
18 from asbestos litigation during the following decades, and asbestos
19 litigation against it increased significantly during the 1990s. In
20 1997, Kelly-Moore hired an attorney, Cheryl Mills, to monitor the
21 litigation and determine the extent of Kelly-Moore's insurance
22 coverage. Ms. Mills reported periodically to the company and its
23 auditors.

24 In December, 1998, Ms. Mills advised Kelly-Moore that, in her
25 opinion and based on a rough estimate, the company had sufficient
26 primary and excess insurance to cover its asbestos liability. She
27 cautioned, however, that "a few large hits in a venue such as El
28 Paso, Texas will throw all of the projections out the window." Id.

1 Ex. 58. By the end of 1999, Kelly-Moore had exhausted its primary
2 insurance coverage. At that time, one of its excess insurers,
3 Liberty Mutual, "began to supervise the defense of the asbestos
4 claims, with assistance from other excess carriers, though they did
5 so under a 'reservation of rights,' contesting whether they had any
6 duty to defend or to indemnify Kelly-Moore for the asbestos
7 liabilities." Id. Ex. 35.

8 II. Establishment of the ESOP

9 In 1998, Mr. Moore hired the firm of Menke & Associates to
10 establish an employee stock ownership plan (ESOP). To determine
11 the value of the stock that would be sold to the ESOP, Mr. Moore
12 first sought an appraisal of Kelly-Moore from Sansome Street
13 Appraisers, a subsidiary of the Menke group. The appraiser, B.J.
14 Brooks, concluded that, as of October 12, 1998, one day before the
15 first ESOP transaction closed, Kelly-Moore was worth \$550 million.

16 The parties dispute whether Kelly-Moore's 1998 appraisal took
17 asbestos liability into account. By the end of 1998, there were
18 almost 10,000 asbestos claims pending against Kelly-Moore.

19 Stephen Ferrari, a Kelly-Moore executive at the time of the stock
20 valuation, stated at his deposition and in a declaration that he
21 discussed the asbestos litigation with Mr. Brooks and assured him
22 that the company had adequate insurance to cover its potential
23 liability. However, at his deposition, Mr. Ferrari could not
24 remember the specific information he provided and did not recall
25 whether he had provided Mr. Brooks with documents concerning the
26 asbestos litigation. Id. Ex. 38 at 245-46.

27 Mr. Brooks died shortly after completing the report, and thus
28 was not available to testify about the information he was provided.

1 However, the valuation report does not mention asbestos litigation,
2 and Defendants have not pointed to any notes or other documents
3 from the valuation that refer to the litigation. Mr. Brooks'
4 handwritten notes contain no mention of asbestos under a section
5 entitled, "What are areas of exposure?" Id. Ex. 53 at 3543. Nor
6 does it appear that Ms. Mills provided any information about the
7 asbestos litigation and insurance coverage directly to Mr. Brooks
8 or to Ernst & Young, the company that audited the financial reports
9 upon which Mr. Brooks relied in conducting his appraisal.

10 In addition, John Menke, the principal of the firm that set up
11 the ESOP, testified that no one from Kelly-Moore alerted him to
12 asbestos litigation until 2001 or 2002. Id. Ex. 40 at 190-92.
13 Robert Ireland, the appraiser who took over after Mr. Brooks'
14 death, testified that he could not recall hearing about the
15 asbestos litigation against Kelly-Moore until 2000. See id. Ex. 47
16 at 75-78.

17 In connection with the establishment of the ESOP, Kelly-Moore
18 was restructured. KMH was created as a holding company, all of
19 whose shares were owned by the Moore Trust. Kelly-Moore and CIG
20 became wholly-owned subsidiaries of KMH. KMH's shares were
21 organized into two groups of "tracking stock," each intended to
22 track the performance of its associated subsidiary: the "series P"
23 stock tracked Kelly-Moore and the "series I" stock tracked CIG.

24 Based on the appraisal report, in October, 1998, Mr. Moore
25 sold forty-two percent of the Moore Trust's interest in KMH's
26 series P stock to the ESOP for \$232 million. Mr. Moore was the
27 sole trustee for the ESOP, and thus was both the buyer and the
28 seller in the transaction.

1 Mr. Moore hired the firm of Duff & Phelps to provide a
2 valuation of KMH's series I stock. Based on this valuation, in
3 October, 1999, Mr. Moore sold forty-two percent of the Moore
4 Trust's interest in KMH's series I stock to the ESOP for \$55
5 million. As with the sale of series P stock, Mr. Moore was both
6 the buyer and the seller in the transaction. Duff & Phelps did not
7 know of the asbestos litigation against Kelly-Moore until 2002.
8 Id. Ex. 59 at 53-54; Ex. 73 at 52.

9 III. Events Subsequent to Establishment of the ESOP

10 In 2000, another paint company, Benjamin Moore, considered
11 purchasing Kelly-Moore. In connection with the negotiations, in
12 July, 2000, Ms. Mills sent a Kelly-Moore executive an update on the
13 status of asbestos litigation against the company. She prefaced
14 her letter with a heading stating, "Use of this document is limited
15 to the extent necessary to apprise Benjamin Moore of the status of
16 the Paco asbestos litigation. This information cannot be used for
17 any other purpose. Release of this information by Benjamin Moore
18 will cause irreparable damage to Kelly-Moore Paint Company, Inc."
19 Id. Ex. 81 (capitalization and punctuation altered). She stated
20 that there were 22,000 active claims in Texas and that it would
21 take approximately three years to resolve them. She added:

22 Kelly-Moore has exhausted its primary level of insurance
23 for personal injury claims. It is now into the first
24 level of its excess coverage. . . . There is a third
25 level of umbrella/excess coverage that has not been
26 involved. Currently, approximately 10% of the claims are
27 dismissed with no payment from the carriers. The
28 remaining claims settle for an average of \$5,000 per
claim.

Kelly-Moore has sufficient coverage to settle all of the
pending claims and those claims made well into the
future. It is unknown how many claims will ultimately be
made against Kelly-Moore, therefore, it is impossible to

1 say whether there is enough insurance indemnity dollars
2 to cover all claims that may be brought in the years to
3 come. In 2000, the number of new claims has varied. The
last figure was six hundred and eighty new claims in
April 2000. It is unknown if that number will increase
or decrease over the next year.

4 Id. at 2. Because of concerns over Kelly-Moore's asbestos
5 liability, Benjamin Moore decided not to purchase the company. Id.
6 Ex. 80 at 54.

7 The number of asbestos claims against Kelly-Moore increased
8 further. On August 28, 2001, a jury in the case of Hernandez v.
9 Kelly-Moore returned a verdict against Kelly-Moore in the amount of
10 \$55.5 million. Although the company later settled the case for \$15
11 million, Kelly-Moore executives regarded Hernandez as a watershed
12 that put into question the company's ability to withstand the tide
13 of asbestos cases against it. In the wake of the settlement,
14 certain of Kelly-Moore's excess insurance carriers declared their
15 policies exhausted. In October, 2001, Kelly-Moore sued these
16 companies in state court for breach of contract.

17 Following Hernandez, Kelly-Moore began to disclose asbestos
18 litigation to Ernst & Young in connection with its audits. Kelly-
19 Moore apparently had previously taken the position that it was not
20 required to report the asbestos litigation because it believed that
21 any liability would be covered by its insurance. See, e.g., id.
22 Exs. 61 & 62.

23 Official communications between KMH and ESOP participants did
24 not mention asbestos litigation until May, 2001, when an issue of
25 the ESOP newsletter for Kelly-Moore employees stated that items
26 which might affect the price of shares "include valuations of other
27 paint companies, our asset and debt levels and product liability
28

1 issues such as asbestos litigation." Ex. 95. In October of that
2 year, another issue of the newsletter discussed the Hernandez
3 litigation:

4 One item you may have noticed in the news in September is
5 the large asbestos judgment against Kelly-Moore. Kelly-
6 Moore is appealing the judgment, and it is believed that
7 we should prevail on appeal. Kelly-Moore does have
8 insurance to cover normal damages in this case. The
9 Company works very hard to defend itself against asbestos
litigation, but such litigation continues to be a concern
to the financial health and the stock price of the
Company. We hope that you will continue to work hard
with us as we continue to fight those legal firms that
unfairly target our Company with such litigation.

10 Id. Ex. 83.

11 Asbestos litigation was first mentioned to CIG employees in an
12 internal memorandum in May, 2002. It stated:

13 [A] factor has been brought to our attention that may
14 have an effect on the future value of our CIG stock. K-M
15 Industries Holding Co., Inc., our holding company, also
16 owns Kelly-Moore Paint Company. Significant asbestos
17 claims have been filed against Kelly-Moore. To date, the
18 costs of these claims have been covered by insurance
19 policies. Kelly-Moore is vigorously proceeding against
20 its various insurance carriers to assure coverage for
these asbestos-related claims. As the asbestos
litigation continues against Kelly-Moore, Kelly-Moore's
current belief is that the litigation is likely to
depress its stock value. As a result of our joint
ownership by K-M Industries Holding Co., Inc., the
asbestos litigation may depress the value of our CIG
stock, which would affect the value of your ESOP account.

21 Id. Ex. 98.

22 In 2002, KMH began to consider bankruptcy due to its exposure
23 to asbestos liability. It consulted with attorneys, who identified
24 the possibility that the company's creditors would attack the ESOP
25 transaction as a fraudulent transfer. Ultimately, KMH did not file
26 for bankruptcy.

27 IV. North Star's Involvement as the ESOP Trustee

28 In 2003, Mr. Moore's deteriorating health necessitated his

1 resignation as the ESOP trustee. North Star was appointed to
2 replace him in April of that year. As North Star began
3 familiarizing itself with KMH's potential asbestos liability, it
4 realized that the initial stock valuation raised some concerns. In
5 notes from a May 14, 2003 due diligence meeting with Kelly-Moore
6 representatives, North Star wrote, "Initial ESOP Purchase -- we
7 need to figure out how far along the asbestos litigation was when
8 the initial purchase took place -- was it factored into valuation?
9 Did Tee [(Trustee)] look at; take into consideration?" Id. Ex. 108
10 at NS20233.

11 Questions about the propriety of the original transaction
12 persisted, and North Star eventually became aware that Kelly-
13 Moore's creditors might attack the transaction in the event that
14 the company filed for bankruptcy. North Star's notes from a June
15 2, 2005 meeting state, "Plaintiffs (ACC) [Asbestos Creditors'
16 Committee] asked about how much money left the company that should
17 have been retained -- looking at potential cause of action against
18 Moores when ESOP was formed[.] [Q]uestion did ESOP pay more than
19 adequate consideration?" Id. Ex. 106 at NS20062.

20 North Star took no action to challenge the price for which the
21 ESOP purchased the KMH shares. In a deposition, a North Star
22 representative stated that this is because the company determined
23 that there was no legal basis for challenging the ESOP transaction.
24 Whether North Star was justified in coming to this conclusion is a
25 question that goes to the merits of Plaintiffs' claim, and is not
26 presently before the Court.

LEGAL STANDARD

Summary judgment is properly granted when no genuine and disputed issues of material fact remain, and when, viewing the evidence most favorably to the non-moving party, the movant is clearly entitled to prevail as a matter of law. Fed. R. Civ. P. 56; Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986); Eisenberg v. Ins. Co. of N. Am., 815 F.2d 1285, 1288-89 (9th Cir. 1987).

The moving party bears the burden of showing that there is no material factual dispute. Therefore, the court must regard as true the opposing party's evidence, if it is supported by affidavits or other evidentiary material. Celotex, 477 U.S. at 324; Eisenberg, 815 F.2d at 1289. The court must draw all reasonable inferences in favor of the party against whom summary judgment is sought. Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986); Intel Corp. v. Hartford Accident & Indem. Co., 952 F.2d 1551, 1558 (9th Cir. 1991).

Material facts which would preclude entry of summary judgment are those which, under applicable substantive law, may affect the outcome of the case. The substantive law will identify which facts are material. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986).

DISCUSSION

Plaintiffs assert a claim against North Star for breach of fiduciary duty in violation of ERISA.¹ See 29 U.S.C.

¹The second amended complaint asserts a second claim against all Defendants, including North Star, for engaging in a "prohibited transaction" in violation of ERISA. Under the relevant ERISA provisions, sales by a plan to a "party in interest" are not

1 §§ 1104(a)(1), 1109, 1132(a)(2), 1132(a)(3). Specifically,
2 Plaintiffs charge North Star with liability under 29 U.S.C.
3 § 1105(a)(3), which provides that a fiduciary "shall be liable for
4 a breach of fiduciary responsibility of another fiduciary with
5 respect to the same plan . . . if he has knowledge of a breach by
6 such other fiduciary, unless he makes reasonable efforts under the
7 circumstances to remedy the breach."² Plaintiffs claim that,
8 despite clear warning signs, North Star did not take adequate steps
9 to investigate whether the ESOP paid more than fair market value
10 for the KMH shares it purchased from the Moore Trust and to remedy
11 the overpayment. Although listed as a single claim, Plaintiffs
12 actually assert two distinct breach claims: the first for North
13 Star's failure to remedy the other Defendants' breaches made in
14 connection with the Kelly-Moore ESOP transaction; and the second
15 for North Star's failure to remedy the other Defendants' breaches
16 made in connection with the CIG ESOP transaction.

17 North Star argues that it cannot be held liable under 29
18 U.S.C. § 1105 because that statute applies only to co-fiduciaries,
19 not to successor fiduciaries. North Star asserts that liability
20 for successor fiduciaries is governed instead by 29 U.S.C. § 1109,

21 _____
22 permitted unless they reflect the fair market value of the asset.
23 See 29 U.S.C. §§ 1106(a), 1106(b), 1108(e). At oral argument,
24 Plaintiffs clarified that they do not intend to pursue this claim
against North Star, which was not involved in either ESOP
transaction.

25 ²North Star asserts that the complaint did not put it on
26 notice of the nature of this claim. However, the complaint alleges
27 that each Defendant who was a plan fiduciary, including North Star,
28 is liable for violating 29 U.S.C. § 1105 "if he, she, or it has had
knowledge of a breach by any other fiduciary, unless he, she, or it
has made reasonable efforts under the circumstances to remedy the
breach." Compl. ¶ 68. This is sufficient to place North Star on
notice of the claim against it.

1 which provides, "No fiduciary shall be liable with respect to a
2 breach of fiduciary duty under this subchapter if such breach was
3 committed before he became a fiduciary or after he ceased to be a
4 fiduciary." 29 U.S.C. § 1109(b).

5 Plaintiffs respond that § 1109 merely provides that a
6 successor fiduciary may not be held vicariously liable for a breach
7 committed by its predecessor. Plaintiffs, however, do not seek to
8 hold North Star vicariously liable for the acts of the other
9 Defendants, but rather charge North Star itself with committing an
10 independent breach of fiduciary duty by failing to remedy the
11 earlier breaches, even though it knew of those breaches.
12 Accordingly, Plaintiffs argue, North Star can be held liable under
13 § 1105.

14 The Ninth Circuit has not addressed the issue of a successor
15 fiduciary's liability under § 1105, and thus there is no binding
16 precedent on point. Plaintiffs' position, however, finds support
17 in an opinion of the Department of Labor:

18 Section 409(b) [29 U.S.C. § 1109(b)] provides that no
19 fiduciary shall be liable with respect to a breach of
20 fiduciary duty under Title I of the Act, if such breach
21 was committed before he became a fiduciary or after he
22 ceased to be a fiduciary. Section 409(b) does not,
23 however, exempt a fiduciary from carrying out his
24 responsibilities to a plan imposed by various provisions
25 of Part 4 of Title I of the Act. For example, although a
26 fiduciary may not be liable under section 409 of the Act
27 for the acts of predecessor fiduciaries, if he knows of a
28 breach of fiduciary responsibility committed by a
predecessor fiduciary, he would be obligated to take
whatever action is reasonable and appropriate under the
circumstances to remedy such breach. Failure to take
such action would constitute a separate breach of
fiduciary responsibility by the successor fiduciary.

DOL Opinion No. 76-95 (Sept. 30, 1976). This view, coming from the
agency charged with enforcing ERISA, is "entitled to respect." See

1 Christensen v. Harris County, 529 U.S. 576, 120 (2000); Villegas v.
2 The Pep Boys Manny Moe & Jack, 551 F. Supp. 2d 982, 990 (C.D. Cal.
3 2008). Other courts have also adopted the statutory interpretation
4 urged by Plaintiffs. See, e.g., Silverman v. Mutual Ben. Life Ins.
5 Co., 138 F.3d 98, 104 (2d Cir. 1998); Conner v. Mid S. Ins. Agency,
6 943 F. Supp. 647, 661 (W.D. La. 1995); McDougall v. Donovan, 552 F.
7 Supp. 1206, 1210 (D. Ill. 1982). In addition, this interpretation
8 is consistent with the common law of trusts, "which imposes a duty
9 on a successor trustee to remedy the breach of a prior trustee, and
10 imposes liability for breach of this duty to the extent to which a
11 loss results from the successor trustee's failure to take such
12 remedial steps." Silverman, 138 F.3d at 104.

13 Of the cases cited by North Star, Stephens v. US Airways
14 Group, 555 F. Supp. 2d 112 (D.D.C. 2008), provides the most support
15 for its position. In that case, the court approved of the view
16 that § 1105 governs liability where a plan has multiple fiduciaries
17 at one time. Nonetheless, the court stated that, although it would
18 be contrary to § 1109 to conclude that "a successor trustee is
19 always liable for a breach by its predecessor . . . , [o]n the other
20 hand, a predecessor's breach that continues to have effect on
21 beneficiaries during the term of a successor trustee must be
22 remedied to the extent practicable under § 1105(a)(3)." Id. at
23 119. As this makes clear, the court adopted Plaintiffs' approach,
24 notwithstanding its suggestion that § 1105 applies to
25 contemporaneous co-fiduciaries only. Ultimately, the court
26 concluded that the plaintiffs could not pursue their claim because
27 the alleged breach was "a single event as to each Plaintiff with no
28 continuing effect to the present." Id. Here, in contrast, the

1 alleged breach committed by North Star's predecessors has a
2 continuing effect: Plaintiffs allege that the ESOP paid more than
3 fair market value for the KMH shares, and has yet to be
4 compensated.

5 The Court concludes that North Star may potentially be liable
6 under § 1105 for its failure to remedy the alleged breaches of
7 fiduciary duty that took place before it was appointed the ESOP
8 trustee, because its failure to act despite allegedly knowing of
9 those breaches could constitute an independent breach of fiduciary
10 duty.

11 North Star also argues that Plaintiffs' claims are barred by
12 the statute of limitations. The parties agree that the time for
13 bringing Plaintiffs' claims is governed by 29 U.S.C. § 1113, which
14 provides:

15 No action may be commenced under this subchapter with
16 respect to a fiduciary's breach of any responsibility,
17 duty, or obligation under this part, or with respect to a
18 violation of this part, after the earlier of--

19 (1) six years after (A) the date of the last action
20 which constituted a part of the breach or violation,
21 or (B) in the case of an omission the latest date on
22 which the fiduciary could have cured the breach or
23 violation, or

24 (2) three years after the earliest date on which the
25 plaintiff had actual knowledge of the breach or
26 violation;

27 except that in the case of fraud or concealment, such
28 action may be commenced not later than six years after
the date of discovery of such breach or violation.

29 U.S.C. § 1113.

30 As noted above, Plaintiffs charge North Star with failing to
31 make a reasonable effort to remedy the breaches of fiduciary duty
32 committed by the other Defendants, despite knowing of facts

1 sufficient to inform it of those breaches. Because Plaintiffs seek
2 to impose liability on North Star for its omissions, each of North
3 Star's actionable alleged breaches of fiduciary duty occurred on
4 the latest date on which North Star could have cured the relevant
5 breaches by the other Defendants.³ Assuming that the other
6 Defendants did not engage in "fraud or concealment," North Star
7 could have brought a lawsuit against them for breaches made in
8 connection with the Kelly-Moore ESOP transaction until October,
9 2004 -- six years after the October, 1998 transaction.⁴ Similarly,
10 North Star could have brought a lawsuit against the other
11 Defendants for breaches in connection with the CIG ESOP transaction
12 until October, 2005 -- six years after the October, 1999 ESOP
13 transaction. North Star's alleged breaches thus occurred in
14 October, 2004 and October, 2005, when it let its right to sue the
15 other Defendants expire.⁵ Even assuming that Plaintiffs learned of

17 ³Alternatively, if North Star made a final decision, on a
18 specifically identifiable date, not to pursue action against the
19 previous fiduciaries, its alleged breach may be considered to have
20 occurred on that date. There is no evidence in the record,
21 however, of any such decision. In the absence of such evidence, on
22 this motion the Court must assume, in Plaintiffs' favor, that North
23 Star's breach did not occur until the last date on which North Star
24 could have cured the earlier breaches.

22 ⁴The statute of limitations provides that a claim must be
23 filed by the earlier of either three years after the date on which
24 the plaintiff had actual knowledge of the breach or six years after
25 the date of the breach. Because North Star could not have had
actual knowledge of the other Defendants' breaches until it was
appointed the ESOP trustee in April, 2003, the end of the six-year
period occurred before the end of the three-year period.

26 ⁵If the previous fiduciaries engaged in fraud or concealment,
27 North Star could have brought a lawsuit against them within six
28 years from the date of its discovery of the breaches, an event
which did not take place until, at the earliest, it was appointed
ESOP trustee April, 2003. For the sake of argument, the Court will
assume that no fraud or concealment was committed by the other

1 North Star's breaches immediately, they had three years -- until
2 October, 2007 and October, 2008, respectively -- to file their
3 claims for those breaches. Because the complaint was filed in
4 November, 2006, North Star is not entitled to summary judgment that
5 Plaintiffs' claims are untimely.

6 North Star argues for a different analysis of the statute of
7 limitations issue. It asserts that the three year period of 29
8 U.S.C. § 1113 applies, and that the period began running for each
9 claim on the date Plaintiffs found out that the ESOP transactions
10 had taken place -- presumably, at the time of the transactions or
11 shortly thereafter. But the plain language of § 1113 states that
12 the three-year period begins to run when the plaintiff learns of
13 the breach, not merely of the transaction in connection with which
14 the breach was committed. In support of its counter-textual
15 interpretation of § 1113, North Star cites only one Ninth Circuit
16 case, Blanton v. Anzalone, 760 F.2d 989 (9th Cir. 1985). In
17 Blanton, the court stated, "The statute of limitations is triggered
18 by the defendants' knowledge of the transaction that constituted
19 the alleged violation, not by their knowledge of the law." Id. at
20 992. This simply means that the limitations period under § 1113
21 begins to run when the plaintiff has knowledge of the unlawful act,
22 rather than of the fact that the act was unlawful. In Blanton,
23 which involved a prohibited transaction claim, not a breach of
24 fiduciary duty claim, the plaintiffs were parties to the
25 transaction and knew at the time of the transaction all of the
26 facts which would have enabled them to conclude, had they known the
27 _____
28 Defendants -- an assumption that is favorable to North Star, but
under which its argument fails nonetheless.

1 law, that the transaction was prohibited. As the court held, their
2 ignorance of the law did not delay the running of the three-year
3 period. Here, Plaintiffs' knowledge of the law is not at issue.
4 Unlike the plaintiffs in Blanton, they did not know of the unlawful
5 act -- Defendants' failure to take into account Kelly-Moore's
6 asbestos liability when valuating the ESOP shares -- at the time of
7 the ESOP transactions. Plaintiffs could not be expected to have
8 filed an ERISA claim for breach of fiduciary duty armed only with
9 their knowledge that the ESOP transactions had taken place, without
10 knowing the facts that constituted the breach. Nothing in the
11 governing law suggests otherwise.

12 Moreover, it is not necessary to determine exactly when
13 Plaintiffs possessed sufficient information to realize that the
14 other Defendants caused the ESOP to pay more than fair market value
15 for the KMH shares. With respect to their breach claims against
16 North Star, the question is not when Plaintiffs learned of the
17 other Defendants' breaches, but rather when they learned of North
18 Star's breaches. By North Star's reasoning, Plaintiffs' claims
19 against it would have been time-barred even before it took over as
20 the ESOP fiduciary. And, contrary to North Star's assertion, the
21 Court is not "extending the six-year period for challenging the
22 1998 and 1999 transactions," Def.'s Mot. at 18, on a "continuing
23 violation" theory, which has been rejected by the Ninth Circuit,
24 see Phillips v. Alaska Hotel and Restaurant Employees Pension Fund,
25 944 F.2d 509, 520 (9th Cir. 1991). Plaintiffs are not directly
26 challenging the 1998 and 1999 transactions through their claims
27 against North Star; they are challenging North Star's failure to
28 remedy breaches made by other fiduciaries in connection with the

1 1998 and 1999 transactions. This failure, which is independently
2 actionable under 29 U.S.C. § 1105(a)(3), took place long after the
3 dates of the transactions themselves.

4 The Court concludes that, on the present record, Plaintiffs'
5 claims against North Star for breach of fiduciary duty are not
6 time-barred as a matter of law.

7 CONCLUSION

8 For the foregoing reasons, the Court DENIES North Star's
9 motion for summary judgment (Docket No. 210). Because Plaintiffs
10 have reached a negotiated settlement of their claims against the
11 remaining Defendants, those Defendants' motions for summary
12 judgment (Docket Nos. 130 and 140) are DENIED as moot.

13 IT IS SO ORDERED.

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15 Dated: 11/14/08



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CLAUDIA WILKEN
United States District Judge